

HONORABLE PHYLLIS J. HAMILTON

IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CARL SCHLACHTE and
NANCY SCHLACHTE,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA

Defendants.

Case No. CV 07-06446 PJH

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

In 2000, Carl and Nancy Schlachte, following the advice of their financial advisor, allowed Derivium Capital to take possession of their ARM Holdings stock as collateral for a three year loan. Complaint ¶ 8. At the end of three years, by the terms of this loan, the Schlachtes could either repay the loan and receive their stock back, or forfeit the stock in total satisfaction of the loan. *Id.* In 2003 when the loan became due, ARM Holdings stock had declined and the Schlachtes forfeited the stock. Complaint ¶ 27-28. Derivium did not

1 file 1099 forms reporting the stock sale to the IRS or to the Schlachtes. United States
 2 Complaint ¶ 66-68; *U.S. v. Cathcart*, (No. C074762) (N.D. Cal) (filed Sept. 7, 2007).

3 The IRS investigated Derivium and erroneously decided to treat the loan as a “sale”
 4 in 2000 when the loan was written rather than as a disposition in 2003 when the stock was
 5 forfeited. Complaint ¶ 30. On December 21, 2007, the Schlachtes filed a Complaint with this
 6 Court asking the Court to determine the correct tax treatment of the loan. Complaint pp. 1-
 7 15.
 8

9 The IRS filed an Answer on April 5, 2008, but did not file a motion to dismiss at
 10 that time, correctly admitting that the Court had jurisdiction over all of the Schlachtes’
 11 claims. Answer ¶ 5. The Answer contained no objection to the sufficiency of the Schlachtes’
 12 theft claims. Two weeks after the Answer was filed the IRS recognized that the Answer was
 13 insufficient to defeat the Schlachtes’ claims and filed a Motion to Dismiss seeking technical,
 14 but erroneous grounds to avoid having the Schlachtes’ claims heard by this Court. MTD pp.
 15 1-4.
 16

17 First, the IRS seeks to avoid this Court’s jurisdiction by falsely claiming that “The
 18 theft loss was never presented to or considered by the IRS.” Defendant’s MTD p. 5 ln. 2-9.

19 Second, the IRS brings an untimely 12(b) (6) motion trying to defeat Schlachtes’
 20 ***alternative claim*** by pointing out that it is inconsistent with their ***primary claim***.
 21 Defendant’s MTD p. 5 ln. 2-9. Schlachtes’ primary claim is that the transaction was a loan.
 22 The transaction is between two independent parties and the paperwork sets out a loan.
 23 Complaint ¶ 13. The Schlachtes intended the transaction to be a loan. *Id.* The Schlachtes
 24 were entitled to receive their stock back at the end of the loan and would have asserted this
 25 right if the stock had appreciated. Complaint ¶¶ 8-9. Instead, the Schlachtes ended the loan
 26

1 and forfeited the stock in 2003. Complaint ¶¶ 27-28.

2 The IRS is claiming that the transaction was intended as a “sale” in 2000. Answer ¶
 3 18. The IRS claims to be making a “Substance over Form” argument. Because the IRS has
 4 found little “substance” to support their “sale” theory, its “substance over form” argument
 5 should more aptly be called a “speculation over form” argument. The IRS ignores: the
 6 clearly expressed intention of the original borrower and lender that the stock was to be kept
 7 as collateral; and the IRS ignores the borrowers’ right to redeem the stock by paying off the
 8 loan, which is further indicia of a bona fide loan versus sale. Complaint ¶¶ 8-9. The IRS
 9 attempts to speculate away the legal and economic consequences of the Loan Agreement,
 10 particularly the Schlachtes’ right to redeem the stock. The IRS also makes the erroneous
 11 argument that the Schlachtes must also have intended a sale from the beginning of the loan
 12 because the Derivium paperwork complied with Regulation T (by transferring legal title and
 13 giving Derivium the right to sell the stock short) and ***Derivium*** may have breached the
 14 agreement by selling the stocks at the beginning of the loan. The IRS attempts to speculate
 15 away the legal and economic consequence of the Loan Agreement, particularly the
 16 Schlachtes’ right to redeem the stock.
 17

19 In reply to the IRS argument (and therefore as an alternative to loan treatment)
 20 Schlachtes asserted that *if* the transfer to Derivium was a “**sale**” the Schlachtes were victims
 21 of theft. Complaint ¶ 10. The theft occurred when the Schlachtes were induced by Derivium
 22 and their broker to sell their stock for 90% of the value based on false representations
 23 including a promised redemption feature that the lender had made no preparations to honor.
 24 Complaint ¶¶ 10-11. The Schlachtes did not discover the theft until after the long after they
 25 had forfeited their stock. The IRS argues that Derivium operated “something of a Ponzi
 26

1 scheme." United States Complaint ¶ 62; *U.S. v. Cathcart*, (No. C074762) (N.D. Cal) (filed
 2 Sept. 7, 2007). Isaacson Decl. Exh. 2 p 1.

3 The Schlachtes point out that, under California law, to the extent their signatures
 4 were induced by deception, the agreement is unenforceable. Under these circumstances, the
 5 Schlachtes did not part with title, and Derivium obtained no rights in the property. Civ. §
 6 1689; CTC Real Estate Services v. Lepe, 44 Cal.Rptr.3d 823, 824, 140 Cal.App4th 856,
 7 (Cal. Ct. App. 2nd Div. 2006). Therefore, the transaction cannot be deemed a "sale,"
 8 contrary to how the IRS attempts to describe it.
 9

10 I. **Law Applicable to Motions to Dismiss**

11 A Rule 12(b)(6) motion "should not be granted unless 'it appears beyond a doubt that
 12 the plaintiff can prove no set of facts in support of his claim which would entitle him to
 13 relief.'" *Hall v. Thomas*, 190 F.3d 693, 696 (5th Cir. 1999) (quoting *Conley v. Gibson*, 355
 14 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). When considering a motion to dismiss,
 15 the court must presume all factual allegations of the complaint to be true. *Bayonne v Pitney*
 16 *Bowes, Inc.* (2004, DC Conn) 15 AD Cas 341. "The question therefore is whether, in the
 17 light most favorable to the plaintiff and with every doubt resolved in his behalf, the
 18 complaint states any valid claim for relief." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586
 19 (5th Cir. 1999).

21 The issue to consider on a motion to dismiss is not whether a plaintiff will ultimately
 22 prevail but whether the claimant is entitled to offer evidence to support the claims. See
 23 *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995). Indeed, it is not the
 24 Court's function to weigh the evidence that might be presented at trial; instead, the Court
 25 must merely determine whether the complaint itself is legally sufficient. Indeed, it is not the
 26

Court's function to weigh the evidence that might be presented at trial; instead, the Court
 1 must merely determine whether the complaint itself is legally sufficient. *Davis v. Cotov*, 214
 2 F. Supp. 2d 310, 315 (D.N.Y. 2002)

In ruling on the sufficiency of a complaint, the court may consider exhibits attached
 4 to the complaint and matters properly the subject of judicial notice. See *Hal Roach Studios*
 5 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). A court may
 6 consider a writing referenced in a complaint, but not explicitly incorporated therein if the
 7 complaint relies on the document and its authenticity is unquestioned. *Swartz v. KPMG LLP*,
 8 476 F.3d 756, 763 (9th Cir. 2007); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998),
 9 superseded by statute on other grounds as stated in *Abrego v. Dow Chem. Co.*, 443 F.3d 676
 10 (9th Cir. 2006); see also *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) The
 11 court otherwise may not consider matters outside the complaint. See *Arpin v. Santa Clara*
 12 *Valley Transportation Agency*, 261 F.3d 912, 925 (9th Cir. 2001)

15 USA's Motion to Dismiss does not pass the test of strict scrutiny imposed by Rule
 16 12(b)(6).

18 **II. Defendant's 12(b) (6) Motion is Untimely and Should be Dismissed.**

19 In the Ninth Circuit the rule is that if a Federal Rule of Civil Procedure Rule 12(b)
 20 (6) motion is made after the answer is filed the Court may deny the motion to dismiss as
 21 untimely or consider the motion under FRCP 12(c). *Aldabe v. Aldabe*, 616 F.2d 1089, 1093
 22 (9th Cir. 1980); *Hargrove & Costanso v. United States*, 1994 U.S. Dist LEXIS 17304 (N.D.
 23 Cal. 2007).

25 This Court should also decline to consider the IRS's motion to dismiss due to the fact
 26 that the IRS failed to raise the defense of "failure to state a claim" in their Answer to the

1 Compliant. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). It is prejudicial to the
 2 Plaintiff for the Defendant to make a 12(b)(6) Motion to Dismiss when the defense was not
 3 raised asserted in the Answer. The requirement that a defendant make a 12(b)(6) motion
 4 before answering preserves the plaintiff's right under Rule 15(a) to amend the complaint
 5 because a 12(b)(6) motion is not a responsive pleading. If the defendant raises a Rule
 6 12(b)(6) defense in the answer, it must contain every allegation necessary to show that
 7 plaintiff fails to state a claim. Any deficiency in these allegations of deficiencies will cause
 8 the motion to fail, and the examination of the allegations in the Answer or the Complaint
 9 would then demonstrate that material issues are in dispute. Here, however, the IRS's Answer
 10 deprives the Schlachtes' of the right to amend, and the Answer does not make any of the
 11 allegations necessary to assert the defense of failure to state a claim.
 12

13 Plaintiffs respectfully request the Court consider the prejudice to Schlachtes caused
 14 by the IRS's failure to make a timely motion and to exercise the Court's prerogative that it
 15 deny the untimely 12(b) (6) motion.

16 **III. The Schlachtes' Treatment of the Derivium Transaction as a Loan is presumed
 17 Correct.**

18 The form and substance of the Schlachtes' Transaction with Derivium is set out by
 19 the Master Agreement to Provide Financing and Custodial Services (Master Agreement)
 20 Complaint, Ex. A. The Master Agreement sets out an agreement to initiate a loan with
 21 Derivium Capital taking custody of the stock and "being authorized to act on behalf of the
 22 Client with respect to the [stock] for the purposes of:
 23

- 24 a) Providing or arranging financing by one or more loans...
- 25 b) Holding cash, securities, or other liquid assets [] on behalf of the Client...

1 c) Voting shares and receiving dividends or interest on securities held as collateral.”

2 Master Agreement Item 1.

3 A more accurate interpretation of the contract is that Derivium is obligated to hold
 4 the securities, vote the stock, and receive dividends and interest, *on behalf of the Clients*.
 5 For dividends, this interpretation is confirmed by Schedule A-1, Item 5 (attached to the
 6 Master Agreement) “All Dividends will be received as cash payments against interest due,
 7 with the balance of interest owed to accrue until maturity date.” Thus, dividends are
 8 received for the benefit and on behalf of the Clients. The Schlachtes interpret the same
 9 clause correctly to mean that Derivium will act regarding voting rights in a similar fashion;
 10 namely that Derivium was obligated to vote the stock on Schlachtes’ behalf and at
 11 Schlachtes’ direction. Under the contract terms, the Schlachtes retained the benefits of
 12 ownership in ARM stock including voting rights and the benefit of any dividends. If the
 13 meaning of the contract is not clear, it should be given the Schlachtes’ interpretation by
 14 construing the agreement against Derivium as the drafter following the judicial doctrine of
 15 contra proferentem.

16 In the Ninth Circuit: “[W]here a transaction has economic substance and is
 17 economically realistic, it should be recognized for tax purposes, and the fact that a
 18 transaction is so arranged that the tax consequences are highly favorable to one of the parties
 19 affords the Commissioner no license to recast it into one of less advantage.” *Lewis & Taylor,*
 20 *Inc. v. Commissioner*, 477 F.2d 1074, 1077, (9th Cir. 1971) (Citing: *Peter Pan Seafoods, Inc.*
 21 *v. United States*, 417 F.2d 670 (9th Cir. 1969); *Gyro Engineering Corp. v. United States*, 417
 22 F.2d 437. The Court in *Lewis & Taylor* went on to quote, with approval, *Edwards v.*
 23 *Commissioner*, where the Tenth Circuit Court of appeals supported the proposition that

1 "Form, absent exceptional circumstances, reflects substance." *Id.* (Quoting 415 F.2d 578,
 2 582, (10th Cir. 1969). The IRS has the burden of proving that the substance of the
 3 transaction is something other than its form. The IRS attempts to misconstrue that plain
 4 language and intent of the transaction by misinterpreting it to mean that "Derivium acquired
 5 the benefits of owning the ARM stock, including ... voting rights, and receipt of (any)
 6 dividends." MTD p 4 ln. 4-6.

7 Inexplicability, the IRS places great weight on the agreement's mandatory
 8 Regulation T and SEC disclosures which include the Consent to Lend Securities Provision
 9 and a Rule 8c-1 Hypothecation Consent¹:

10 The Client² understands that by transferring securities as collateral to DC and
 11 under the terms of the Agreement, the Client gives DC and/or its assigns the
 12 right, without requirement of notice to or consent of the Client, to assign,
 13 transfer, pledge, repledge, hypothecate, rehypothecate, lend, encumber, short
 14 sell, and/or/sell outright some or all of the securities during the period
 15 covered by the loan. The Client understands that DC and/or its assigns have
 16 the right to receive and retain the benefits from any such transactions and that
 17 the Client is not entitled to these benefits during the term of the loan."

18 Master Agreement Item 3.

19 What the IRS fails to mention is that the language in this clause is standard
 20 mandatory language required by the Federal Reserve Board's Regulation T to be included in
 21 every Margin Loan Agreement.

22 The Federal Reserve Board specifies a structure of accounts that
 23 broker-dealers must establish to implement Regulation T. The chief accounts
 24 are the Cash Account, the Margin Account, the Good Faith Account, and the
 25 Special Memorandum Account (SMA). ...

26 ¹ See *Secuties lawyer's Deskbook, General Rules and Regulations promulgated under the Securities Act of 1934; Rule 8c-1 - - Hypothecation of Customers' Secutites* (U. Cin. Sch. Law) at <http://www.law.uc.edu/CCL/34ActRls/rule8c-1.html>.

27 ² The IRS has insisted on replacing "the Client" with "Taxpayer" when quoting this section of the master
 28 Agreement.

1 The Margin Account records transactions in, and holdings of, both
 2 margin securities and other securities, as defined in Regulation T and
 3 discussed above. ***Securities in the Margin Account must be in “street***
name” that is, the broker-dealer is the legal owner, and they must agree to
allow brokers to lend their securities for short sale by other customers.

4 Peter Fortune, *Margin Requirements, Margin Loans, and Margin Rates: Practice*
 5 *and Principles*, New England Economic Review, pg. 24. (September/October, 2000),
 at <http://www.bos.frb.org/economic/neer/neer2000/neer500b.pdf>.

6 In addition, virtually every Margin Account Agreement and/or related
 7 customer disclosure explains that the broker can lend, pledge, hypothecate (which is
 8 pledging securities without delivering them), or liquidate the securities held for the
 9 customer. This is because Brokers earn fees and borrow money by lending,
 10 hypothecating, and pledging securities. These agreements anticipate that these
 11 activities may sometimes require at least temporary liquidation of the pool of
 12 securities held by the broker.

14 Before the Broker can lend securities rules, including SEC Rule 8c-1, require
 15 that the Broker obtain the owner’s consent and to disclose to customers that these
 16 activities are likely to occur. Borrowing on customers stock is such a common
 17 activity that virtually all Margin Agreements include these terms. In fact, a
 18 significant source of funds used to make margin loans is commercial bank loans
 19 using the securities held by broker-dealers as collateral:

21 “Brokers obtain the funds for margin loans from several sources. First,
 22 internal funds can be used to make loans. Second, the broker can use
 23 customers’ cash deposits, paying customers the interest they would normally
 24 receive. Finally, brokers can borrow the money from commercial banks or
 25 other lenders subject to appropriate collateral. At year-end 1999, about 157.8
 26 billion was loaned by commercial banks to broker-dealers on security
 collateral; this is equal to almost 70 percent of total debit balances at broker-
 dealer margin accounts. This overstates the use of bank credit to finance
 broker-dealer margin loans because brokers borrow for other purposes, such

1 as carrying their own securities.” *Id.* at 31.

2 Since these are standard terms it is not surprising that the Superior Court of
 3 California for Sacramento County, when called upon to consider whether Derivium’s Master
 4 Agreement was a “sale” or a “bona fide secured transaction in outstanding shares” in the
 5 case of *California v. Derivium Capital*, (02-as-05849) (November 5, 2003), found no
 6 evidence that the agreement was anything other than a bona fide secured transaction in
 7 outstanding shares.

8 Whether the circumstances in this case warrant setting aside the form of the
 9 transaction is a fact issue that should rightly be left to a jury to decide. Only the trier of fact,
 10 upon consideration of the entire transaction should determine the factual category in which a
 11 particular transaction belongs. *U.S. v. McNair Realty Co.*, 298 F.2.d 35, (9th Cir. 1961)
 12 (Citing; *U.S. v. Cumberland Public Service Co.*, 338 U.S. 451 (1950); *Haggard v. Wood*,
 13 298 F.2d 24, 26 (9th. Cir., 1961; *Rollingwood v. Commissioner*, 190 F.2d 263, 265 (9th. Cir.
 14 1951). The trier of fact in this case will need to determine the intent of the actors to decide
 15 whether the transaction was a loan, theft, or “sale.” The date of disposition is also a
 16 question of fact for the trier of fact to decide. If the transaction is determined to be a sale, it
 17 is proper for the trier of fact to determine whether the sale was intended at the beginning of
 18 the contract or three years later.

21 **IV. Schlachtes’ Adequately Assert an Alternative Theory that the Substance of the
 22 Derivium Transaction is a Theft and entitled to Theft Treatment.**

23 If it is determined that the loan documents do evidence a “sale,” which, again the
 24 Schlachtes dispute, then the Schlachtes were victims of theft. Complaint ¶ 10. Under these
 25 circumstances the Schlachtes were induced to sell their stock for 90% of the value based on
 26

1 Derivium's false promises of a loan with a promised redemption feature that the Derivium
 2 had made no preparations to honor. Complaint ¶¶ 10-11. Under these circumstances, the
 3 Schlachtes would agree with the IRS' description that Derivium operated "something of a
 4 Ponzi scheme."

5 Again, under California law, if the Schlachtes' signature on the agreement was
 6 induced by deception the agreement is unenforceable, the Schlachtes did not part with title
 7 and Derivium obtained no rights in the property. Civ. § 1689; *CTC Real Estate Services v.*
 8 *Lepe*, 44 Cal.Rptr.3d 823, 824, 140 Cal.App.4th 856 (Cal. Ct. App. 2nd Div. 2006). This
 9 would stop the transaction from being a "sale" as described by the IRS.
 10

11 The Schlachtes' claim of theft supports a 2003 date of disposition. In 2003, Derivium
 12 made its last series of representations which falsely implied that Derivium still had control
 13 of the stock and was prepared to honor the loan contract. Complaint ¶¶ 27-28. These
 14 representations knowingly concealed that Derivium was operating a Ponzi scheme. They
 15 were calculated to give the false impression that Derivium had honored the contract and was
 16 now entitled to either have Schlachtes pay the loan in full or forfeit the stock. The
 17 Schlachtes relied upon Derivium's representations and signed paperwork releasing any
 18 remaining interest in the stock. *Id.* If Derivium had truthfully disclosed to the Schlachtes that
 19 it had failed to honor the contract and instead was operating a Ponzi scheme and was relying
 20 on future victims' "investments" to repay Schlachtes, the Schlachtes would have reported
 21 Derivium to the authorities and tried to recover the 10% of original stock value instead of
 22 assenting to the release of the stocks.
 23

24 The Schlachtes also assert that if their stock had increased in value beyond the loan
 25 repayment requirement, it is a question of fact as to whether Derivium would have honored
 26

1 their obligation to return the shares, or engaged in theft. United States Complaint ¶ 61-63;
 2 *U.S. v. Cathcart*, (No. C074762) (N.D. Cal) (filed Sept. 7, 2007). The first claim of theft
 3 alleged against Derivium that the that Schlachtes were aware of where Derivium is alleged
 4 to have failed to return collateral at the end of a loan is *Hammond Family 1994 v.*
 5 *Diversified Design*, No. 2:04-cv-22855 (D.S.C. Filed November 3, 2004). The Schlachtes
 6 did not discover the complaint and therefore did not have reason to suspect they were
 7 victims of theft until after 2004.
 8

9 **V. Defendant's 12(b) (1) Claim Fails Because the Theft Claim was Considered;
 Before the Original Denial .**

10 The IRS correctly asserts that: "To the extent the complaint asserts grounds for
 11 refund previously presented to the IRS in the taxpayer's administrative claim, the court had
 12 jurisdiction under 28 U.S.C. § 1346(b)." MTD p 3 ln 4-5. The IRS also correctly
 13 acknowledges that the controlling case over IRC § 7422 compliance and whether there has
 14 been a government waiver is *Bear Valley Mutual Water Co. v. Riddell*, 493, F.2d 948 (9th.
 15 Cir. 1974).

16 However, the Administrative file does show that the Theft Treatment was raised and
 17 considered in the administrative hearing. Waiver under the *Angulus Milling* standard as
 18 quoted in *Bear Valley* happens when: "The Commissioner understood the specific claim that
 19 was made even though there was a departure from form in its submission." *Bear Valley*
 20 *Mutual Water Co. v. Riddell*, 493, F.2d 948, 952 (9th. Cir. 1974) Quoting *Angulus Milling*
 21 *Co. v. Commissioner*, 325 U.S. 293, 297-98, (1945).

22 The Schlachtes' refund request was transferred to an Internal Revenue Agent Badge
 23 number 94-06686 by the name (or pseudonym) of Elain Li. Ms. Li contacted the Isaacson
 24

1 Law Firm to enquire whether the Schlachtes were going to accept settlement initiative or
 2 pursue their refund claim. Ms. Li's hand written notes for June, 8, 2006, from her
 3 Examining Officer's Activity Record, states:

4 "Return call to Rep. Brian Isaacson. Discussed case status, Rep. disagreed
 5 W/IRS Position. He stated that TP did not know Derivium would sell the
 6 stock [] and run off with the money. Rep. also stated that TP expected to
 7 receive [] the stock back as soon as he paid off the loan. When questioned
 8 Rep. how the loan was supposed to be paid off, Rep. stated that it [] should be
 paid off according to the contract. Rep's question & position was that IRS
 don't know the actual sales of stock occurred. He also stated that there should
 be a theft loss due to DC sold TP's stocks W/O his knowledge."

9 Isaacson Decl. Exh. 3 p 1-2.

10 On June 26, 2006, the Schlachtes' nine page appeal letter was mailed and faxed to
 11 Ms. Li. It was accompanied by over a hundred pages of exhibits and clearly set out a
 12 consideration of theft treatment. Isaacson Decl. Exh. 4 pp 1-9.

13 On June 27, 2006, Ms. Li investigated whether the case would be accepted by
 14 appeals, a preliminary decision was made that it would not be, but Ms. Li was instructed to
 15 contact coordinated appeals to the case. Isaacson Decl. Exh. 3 pp 2-3.

16 On July 6, 2006, Ms. Li was notified that the case would be accepted by appeals but
 17 was told to "advise Rep. of appeal's position in supporting the gov's position." Isaacson
 18 Decl. Exh. 3 p. 3. The appeal was heard by an Appeals Officer by the name (or pseudonym)
 19 of Ronald Cunningham who considered the theft issue and determined "Derivium was
 20 operating something of a "Ponzi" Scheme, as it didn't actually hold the stock given to it by
 21 "borrowers" like the taxpayers as collateral for loans it allegedly made to the "borrowers". It
 22 would sell the stock off shortly after receipt, using the funds to pay off other "borrowers" in
 23 return for other stock." Isaacson Decl. Exh. 2 p 1.

24 Mr. Cunningham felt bound to follow, or was instructed to follow, an "Appeals Case

1 Memorandum for Derivium Capital, LLC that was prepared in conjunction with the closing
2 of some earlier cases from this [Derivium] project” and “[A]n ‘advisory opinion’ prepared
3 by IRS Counsel which was used as the primary basis by Compliance for setting up this
4 issue.” *Id.* If Mr. Cunningham’s formal opinion did not show that he considered the theft
5 claim it was because he declined to document the arguments and authorities put before him.
6 Plaintiffs respectfully submit that no deference should be afforded the IRS determinations
7 because the IRS: had incorrectly prejudged the facts and the outcome of the hearing, failed
8 and refused to consider the law and the fact presented by the taxpayer, the IRS was
9 operating far outside its area of expertise, and its determinations were clearly erroneous as to
10 the facts and law.
11

12 For all of the foregoing reasons, it is respectfully requested that the motions to
13 dismiss be denied.
14

DATED this 6th day of May, 2008.
15

ISAACSON & WILSON, P.S.
16

17 */s/ Mark J. Wilson*
18 Mark J. Wilson Cal. Bar No. # 96985
19 Attorney for Plaintiff
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1 CERTIFICATE OF SERVICE
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3

4 The undersigned hereby certifies that a copy of the foregoing was delivered on May
5 6, 2008 to the CM-ECF system of the United States District Court for the Northern District
6 of California for electronic delivery to all counsel of record.
7
8

9 Thomas M. Newman thomas.newman2@usdoj.gov
10
11

12 Mark J. Wilson mjwilson@isaacsonwilson.com, sjbridges@isaacsonwilson.com,
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16 */s/ Mark J. Wilson*
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HONORABLE PHYLLIS J. HAMILTON

IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CARL SCHLACHTE and
NANCY SCHLACHTE,
Plaintiffs,

v.

Case No. CV 07-06446 PJH

[PROPOSED] ORDER ON
DEFENDANT'S MOTION TO DISMISS

THE UNITED STATES OF AMERICA

Defendants.

ORDER

THIS MATTER came regularly for hearing before the undersigned Judge on Defendant's Motion to Dismiss. Plaintiffs against whom the motion was brought were represented by counsel, as noted in the record. After considering the moving, opposition, and reply papers and the declarations and exhibits attached thereto submitted by all the parties, and good cause appearing,

[PROPOSED] ORDER ON DEFENDANT'S MOTION TO
DISMISS- 1

ISAACSON & WILSON, P.S.
701 Fifth Avenue, Suite 5810
Seattle, Washington 98104
Telephone: (206) 448-1011
Fax: (206) 448-1022

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is hereby DENIED.

Dated this _____ day of _____, 2008.

Honorable Phyllis J. Hamilton

Presented by

ISAACSON & WILSON, P.S.

/s/ Brian G. Isaacson
Attorneys for Plaintiff

1 CERTIFICATE OF SERVICE
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4 The undersigned hereby certifies that a copy of the foregoing was delivered on May
5 6, 2008 to the CM-ECF system of the United States District Court for the Northern District
6 of California for electronic delivery to all counsel of record.
7
8

9 Thomas M. Newman thomas.newman2@usdoj.gov
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12 Mark J. Wilson mjwilson@isaacsonwilson.com, sjbridges@isaacsonwilson.com,
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15

16 /s/ Brian Isaacson
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[PROPOSED] ORDER ON DEFENDANT'S MOTION TO
DISMISS- 3

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